NO. 82283-2

SUPREME COURT

OF THE STATE OF WASHINGTON

ROBIN M. FREEMAN N/K/A ROBIN ABDULLAH, Petitioner

v.

ROB R. FREEMAN, Respondent

RESPONDENT'S BRIEF IN ANSWER TO THE BRIEF OF AMICUS CURIAE

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A. INTRODUCTION

The Court is being asked to establish a standard for modification and/or termination of permanent domestic violence protection orders. Amici Curiae Legal Voice, Washington State Coalition Against Domestic Violence and Sexual Violence Law Center, in support of Appellant, advocates establishment of CR 60 as the sole standard for doing so. Respondent believes such a standard is inconsistent with the public policy of the Domestic Violence Protection Act, renders the modification provision of RCW 26.50.130(1) superfluous, and offers the comprehensive standard articulated by the New Jersey Supreme Court as the better alternative. See *Respondent's Response to Supplement Brief.*

B. ARGUMENT

1. 60(b) SHOULD NOT BE THE SOLE STANDARD FOR MODIFICATION AND/OR TERMINATION OF PERMANENT PROTECTION ORDERS:

a) Application of a purely equitable standard violates the public policy of the DVPA.

CR 60(b)(6) permits a court to "relieve a party . . . [if] . . . it is no longer equitable that the judgment should have prospective application". The rule, applying primarily to injunctions and judgments other than those for money damages, allows the court to manage problems that arise under a judgment that has continuing effect "where a change in circumstances after the judgment is rendered makes it inequitable to enforce the judgment". *Pacific Security v.*

Tangleood, Inc., 57 Wn. App. 817, 790 P.2d 643 (1990) (citing, *Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 438, 723 P.2d 1093 (1986); *United States v. American Nat'l Bank & Trust Co.*, 101 F.R.D. 770 (N.D. Ill. 1984). Decisions by the trial court under CR60(b) will not be reversed absent manifest abuse of discretion. *Fahlen v. Mounsey*, 46. Wn. App. 45, 728 P.2d 1097 (1986).

Amici argues that limiting relief from a permanent domestic violence restraining order to CR 60 would provide "a clear standard" and allow for relief that is "structured and equitable". *Brief of Amici Curiae Legal Voice, Washington State Coalition Against Domestic Violence, and Sexual Violence Law Center*, at 17- 20; *Petitioner's Supplemental Brief* at 13). However, because no Washington case has ever considered modification or termination of a permanent domestic violence protection order under CR 60, there is neither standard nor structure to apply. Lacking a framework for guidance, there can be no uniformity or consistency. Instead, application of this "standard" would indeed FORCE a court to weigh the inequities; namely whether the victim's fear is outweighed by the respondent's need to have the order lifted. Although Amici takes the position that the respondent's needs should not matter, they ask that the court adopt a standard that would REQUIRE the court to consider his position.

Furthermore, application of the CR 60 standard is not good for victims

because it makes it MORE likely that a court would lift or modify a permanent order where there remains a risk that the respondent would commit acts of violence in the future.

If the court also accepts the suggestion by Amici that modification or termination of a permanent protection order does not require a "current fear that physical harmful acts or threats of imminent harm would occur upon lifting the order", (*Brief of Amici Curiae Legal Voice, Washington State Coalition Against Domestic Violence, and Sexual Violence Law Center* at 7- 20; *Petitioner's Supplemental Brief* at 14 - 15) the trial court is free to weigh the peace of mind of the victim against the employment needs of the restrained party. Precisely, the result that Amici (and Appellant) seek to avoid.

What Amici does not seem to understand is that the requirement that the court consider objective reasonable fear in determining whether to grant or deny a motion to terminate a permanent protection order is consistent with the public policy of protecting of victims, particularly when they are disinclined to protect themselves. Since victims routinely ask that restraining orders be terminated, regardless of facts and circumstances which would cause a reasonable person to be fearful, the requirement that the court independently determine objective fear serves the public policy of protecting victims and their children from abuse. *Kohn, L., The Justice System & Domestic Violence: Engaging the Case But*

Divorcing the Victim[1], at 231; *Stevenson v. Stevenson*, 714 A.2d 986, 993 (N. J. Super. Ct. 1998) (victim's subjective fear is unreliable indicator of danger).

In contrast to a CR 60 standard, application of the 11 factor New Jersey standard provides real guidance to the court as it asks the single most important question regarding whether to dissolve a permanent order: What is the likelihood that domestic violence acts will resume?

It should be noted that the cases cited by Amici do NOT support application of CR60 to terminating/lifting permanent protective orders.

(1) *Roberts v. Bucci*, 218 S.W. 3d 395 (2007): This case involved a 3-year protection order, subject to renewal at the end of the 3 years and did not involve a permanent order. In that case, the respondent appealed the trial court's determination that civil rule 60 *did not* apply to domestic violence orders. Although the court held that the civil rule *could* apply, it cautioned against its use given the clear purpose of domestic violence legislation. *Id.* at 397.

(2) *Mitchell v. Mitchell*, 62 Mass.App.Ct. 769, 821 N.E. 2d 79 (2005): This was again, a TIME LIMITED protection order, subject to renewal after 1

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[1] Available at: http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__journals__review_of_law_and_social_change/documents/documents/ecm_pro_063486.pdf

year. The respondent appealed the order SIX MONTHS after issuance. The court engaged in a lengthy discussion in which it recognized that while civil rule 60 could be used to modify or terminate a domestic violence order it must recognize the uniqueness of the injunctive relief embodied in a domestic violence order and adopted the flexible standard articulated by the United States Supreme Court *in Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 380, 112 S.ct. 748, 116 L.Ed.2d 867 (1992). (Factors to be considered in determining whether there is a "significant change in circumstances" vary with the type of case and whether complete dissolution of an injunction is sought or only a modification).

(3) *Dvorak v. Dvorak,* 635 N.W.2d 135 (N.D. 2001): Although this case dealt with a permanent order, in North Dakota, they only overturn orders (any orders) if the petitioner can show by clear and convincing evidence that the judgment was obtained through fraud, misrepresentation, or misconduct. As discussed below, to allow a party to obtain an order with great ease (as we should), and then mandate that the restrained party may only lift or modify the order if they can prove fraud, misrepresentation, or misconduct is manifestly unjust.

Finally, even if the court were to apply CR60(b) to the facts of this case, Rob would have no difficulty demonstrating first, a change in circumstance and

second, that the prospective effect of the restraining order against him is unfair, unnecessary and serves no purpose other than to punish him.

When the order was entered almost 10 years ago, the parties were married and Rob was physically involved in an extensive bath remodel which required him to spend long hours at the family home. Apparently, Robin believed that Rob was essential to the remodel process such that she asked Rob's company commander to release him from the barracks (claiming that she had over-reacted when she had accused him of domestic violence) so that he could return to the family home. At that time, Robin's mental state was so fragile that she made a suicide attempt in the family home while her three young children were present. At the time of the entry of the order, Yasmeen was a teenager in opposition to Rob.

All of the circumstances related to the entry of the protection order have changed. When Rob made his request to modify the protection order more than two years ago, he had not been to the State of Washington since the day the protection order was entered. Rob had been absent from Washington for almost three times as long as he was married. The parties were divorced and had no property or other interests in common any longer. Until his motion to modify the protection order was filed, there had not been any allegation that he violated the protection order. There is no credible evidence that he had done so.

Yasmeen, no longer a minor, was a well-educated young woman employed in the Court of Appeals as a law clerk. In the intervening 8 years, Rob had suffered a substantial injury during his military duties and lost a hand among other injuries. Not only had there been a change in circumstances, the protection order no longer served a useful purpose. Instead, it had become excessively burdensome because the restraining order limited Rob's employment opportunities.

Thus, even under a CR 60 standard, the permanent restraining order should be terminated.

b) Domestic Violence Protection Orders are not the same as other injunctions.

Because the public policy of protecting victims makes protection orders easy to obtain, it is fundamentally unfair to apply an extra-ordinarily stringent standard to modify or terminate such an order. RCW 26.50.50 mandates that protection order hearings take place within a very short (14 days) period of time, often with little opportunity for the accused to obtain counsel, understand the full implications of a protection order, and/or prepare a defense. Unlike other civil cases where an injunction is granted after a trial, in domestic violence cases the rules of evidence are suspended. ER 1101(c)(4); *Gourley v. Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006). Further, protection orders are intended to

be coercive and to change behavior. They are inherently "unfair" to the restrained party and often have a life long effect on employment, immigration status, and housing. To require a party, (usually male) to then also overcome an extra-ordinary hurdle to obtain relief from such a judgment may implicate the 14th Amendment (equal protection).

In this case, the court made permanent a domestic violence restraining order at the first full hearing without ever finding that Rob had actually committed an act of domestic violence. Instead, the court only found that Robin's fear was reasonable based on two prior "incidents." CP 31-32.. Although the court had the authority to order domestic violence treatment, it imposed no such requirement on Rob. Had it done so, there might have been evidence of a change in behavior following such treatment. Instead the court entered an order it knew would have immense negative implications for Rob. CP 32.

Unfortunately, Rob already delayed in his military re-assignment by having to attend the hearing, having no attorney to represent him, and no understanding of the implications of a permanent protection order, did not appeal the decision of the court. Unlike other jurisdictions that prohibit the court from entering a permanent order until a protection order has been in place for a year, the Washington domestic violence statute does not. See, *Lonergan-*

Gillen v Gillen, 57 Mass.App.Ct., 746, 747-748 (2003).

The purpose of a one year delay in entering a permanent order is obviously to determine whether the restraints imposed are effective to curb the domestic violence. At a subsequent hearing a year later, the court then has the opportunity to make a factual inquiry that could provide a basis upon which to find that the respondent was likely to *resume* acts of domestic violence. In this case, Rob had no opportunity to demonstrate he would not resume acts of domestic violence before a permanent order was entered. He is now hard pressed to prove that he is "not likely to resume" prohibited acts when there was no evidence that he was ever "likely to resume" prohibited acts in the first instance.

c) The court cannot ignore RCW 26.50.130(1) which expressly provides that the court may "modify" the terms of an existing protection order.

RCW 26.50.130(1) expressly provides that the court may "modify" the terms of an existing protection order. *State v. Dejarlais*, 88 Wn. App. 297, 298, 944 P.2d 1110 (1997) ("parties may protect their rights by petitioning the court to remove the order if there has been a change in circumstances").

This court cannot simply ignore this provision and adopt CR60(b) as the only standard to apply to a motion to modify or terminate a permanent protection order. *Barber v Barber*, 136 Wn. App. 512, 150 P.3d 124 (2007)

(statute should be interpreted so that no part is rendered superfluous).

1. The legislature gave no guidance with respect to a standard to apply for modification or terminating a permanent domestic violence protection order.

Other than allowing for modification of an existing protection order, the Domestic Violence Protection Act (DVPA) is silent as to the standards that should be applied when doing so. RCW 26.50.130(1). Similarly, when the legislature authorized the courts to issue permanent protection orders in 1992, it gave no guidance as to modifying or terminating such orders. Interestingly, the legislative history reveals no discussion whatsoever as to this provision, other than the statement of Rep. Holly Meyers, who sponsored the change as part of legislation related to service by publication of petitions for protection and harassment. *Wash. Senate Bill Report*, SHB 2745 (February 25, 1992), at 5. See Appendix. In fact, the only testimony was that of Rep. Meyers, expressing the concern that it was traumatic for a victim to return to court each year to renew their protection order. *Id.* at 4.

In the absence of legislative direction, this court should adopt a standard that provides intelligent guidance to the trial courts. Such a standard should take into consideration the complex nature of family relationships, as well as the public policy of protecting victims and their children. *Carfango v. Carfango*, 288 N.J. Super. 424, 672 A.2d 751 (Ch. Div. 1995). See *Respondent's Response*

to Supplement Brief. It should reject the suggestion by Amici to ignore factors such as time, distance, and the respondent's employment situation. Those factors and the others listed by the *Carfagno* court are part of an intelligent and appropriate inquiry into whether a permanent restraining order should be modified or terminated.

2. The Court of Appeals correctly found that a current objectively reasonable fear of harm was necessary to maintain a permanent protection order.

Whether "current fear" is required to maintain a permanent protection order is an issue of first impression. There is no question that both current fear and at least a history of past abuse is necessary to renew an order of protection. *Barber v. Barber*, 136 Wn. App. 512, 150 P.3d 124 (2007). When the legislature allowed the courts to issue permanent restraining orders, its intent was to protect the petitioner from future abuse, by limiting the need for repeated court appearances when there was evidence that without a protection order, the respondent was likely to resume acts of domestic violence. If, as Amici suggest, a petitioner could successfully resist a modification or termination, despite having no current reasonable fear of harm, she, not the courts, would have total control over whether such an order could be modified or terminated. The legislature intended to protect petitioners from abuse, not to empower them to punish respondents forever.

In this case, when the Court of Appeals concluded that Robin did not have an objectively reasonable fear of imminent harm, it correctly considered the factors of time and distance in its analysis. *In re Marriage of Freeman*, 146 Wn App. 250, 258, 192 P.3d 369 (2008). The appellate court determined that the likelihood of Rob committing acts of domestic violence after at least 4, and as many as 8, years of no such acts combined with the "distance" between the parties (both terms of their relationship and the geography between them) was so remote that Robin's fear of imminent harm was unreasonable. *Id.*, at 257.

The reason that domestic violence protection laws are limited to intimate relationships is because it is the "closeness" of those relationships that is the context for the power and control dynamics inherent in abusive relationships. RCW 26.50.010. When there is no longer a close relationship between the parties, the power and control dynamic is less likely to operate. See, *Danny v. Laidlaw*, 165 Wn.2d 200, 213, 183 P.3d 128 (2008).

Here, the appellate court reasoned that the two incidents, which formed the basis of Robin's fear at the time of the entry of the permanent protection order, were unlikely to re-occur. *Id.*, at 257. Rob, now no longer in the role of step-parent, living with and responsible for parenting Yasmeen, who is an adult, has no opportunity to exercise any power or control over her whatsoever. Similarly, Robin, from whom he is now divorced, is also not in a continuing

relationship with Rob. *Id*, at 257. They have now been divorced for three times as long as they were married. *Id.*, at 251. Rob has no emotional or economic power over Robin. They have neither a reason nor opportunity to argue which was the context in which Robin described family violence. *CP* 7.

Although Amici presents a hypothetical nightmare of electronic abuse and harassment, there is not a single fact to support it. Further, to assume that travel from Missouri to Washington can easily be accomplished in a "matter of hours" ignores the economic cost of doing so and the fact that all such travel leaves a substantial record within national security databases. In fact, it is the dramatic increase in the use of national databases over the past few years that often creates a punitive effect for the restrained party.

3. The court of appeals accurately stated the lack of evidence of domestic violence.

At the 1998 hearing, the court expressly declined to make a finding of domestic violence. CP 31-32. It also **did not** make a finding that the two incidents it described that formed the basis of Robin's fear were domestic violence, only that her current fear was reasonably based on them. CP 31-32. It is possible that the court commissioner believed that he was hearing a motion for **renewal** and not just the first full hearing on a newly filed petition. Since no new evidence of domestic violence is necessary to either renew or make the

protection order permanent, the only relevant inquiry was whether Robin had a current fear.

The Court of Appeals viewed the allegations made by both Robin and Yasmeen in the most favorable light possible and properly concluded that they do not rise to the level of a threat of imminent harm, injury or assault upon which a reasonable fear can be based. *Freeman*, at 258.

4. The court of appeals correctly held that RCW 26.50.020(1) provides protection to minor family or household members, but does not follow the minor into adulthood.

If the legislature wanted to extend protection of minors upon reaching their majority, it would have said so. Instead, the legislative history reveals a complete lack of consideration of the impact of permanent protection orders on minors once they reach majority. *Wash. Senate Bill Report*, SHB 2745 (February 25, 1992), at 5. See Appendix.

C. CONCLUSION

While it is clear that some standard should apply to the modification or termination of permanent protection orders, CR 60 is not the solution, because: 1) it violates the statutory scheme which includes RCW 26.50.130, and 2) it provides no guidance to the court which must evaluate the changed circumstances and whether a victim continues to require protection.

Respectfully submitted,

1-8-10
DATED

MARGARET BROST
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APPENDIX

288 N.J. Super. 424, *; 672 A.2d 751, **;
1995 N.J. Super. LEXIS 607, ***

TARA CARFAGNO, PLAINTIFF, v. KEVIN J. CARFAGNO, DEFENDANT.

DOCKET NUMBER FV-18-746-92

SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, FAMILY PART, SOMERSET COUNTY

288 N.J. Super. 424; 672 A.2d 751; 1995 N.J. Super. LEXIS 607
November 8, 1995, Decided

SUBSEQUENT HISTORY: [***1] Approved for Publication March 6, 1996.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant former husband sought review of an order by a New Jersey trial court that dismissed appellant's request to have a restraining order had been granted to appellee former wife dissolved.

OVERVIEW: Appellant former husband had harassed, followed, and telephoned appellee former wife. A restraining order was put into effect against appellant. Appellant sought to have the restraining order dissolved. The court determined that appellee had not consented to the dissolution, that she had an reasonable fear of appellant, and that appellant had violated the restraining order several times. The court affirmed the denial of appellant's motion for dissolution, having determined that he had failed to show good cause.

OUTCOME: The court affirmed the denial of appellant former husband's motion to dissolve appellee former wife's restraining order against him, having determined that appellant had failed to show good cause for the dissolution.

CORE TERMS: restraining order, dissolve, domestic violence, subjective,

contempt, alcohol, good cause, dissolving, good cause, consented, violent acts, counseling, harassing, cycle, best interests, dissolution, objectively, convicted, violating, times, twice, good faith, victim fears, similarly situated, reconciliation, restraining, injunction, injunctive, opposing, custody

LEXISNEXIS HEADNOTES

HN1: Under N.J. Stat. Ann. § 2C:25-29(d) the court may dissolve or modify a final restraining order upon good cause shown. Generally, a court may dissolve an injunction where there is a change of circumstances whereby the continued enforcement of the injunctive process would be inequitable, oppressive, or unjust, or in contravention of the policy of the law.

HN2: The following framework may be followed as to an application to dissolve a final restraining order under N.J. Stat. Ann. § 2C:25-29(d) when the request has been made by a defendant: (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the defendant;
(9) whether the victim is acting in good faith when opposing the defendant's request; (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.

HN3: Where the victim has consented to lifting the restraining order and the court finds that the victim is doing to voluntarily, the court should dissolve the order without further consideration or analysis

HN4: Final restraining orders may be dissolved upon good cause shown. N.J. Stat. Ann. § 2C:25-29(d). Permission of the victim is not required before the court can dissolve a final restraining order.

Essentially, if the court were to consider only subjective fear, it would

be merely determining whether the victim consented to dissolving the final restraining order without considering other relevant information. This interpretation would render the good cause shown language inoperative. Thus, the courts must consider objective fear -- not subjective fear.

HN5: The court must look to determine whether the relationship today is one that would allow the defendant to exercise control over the victim. Where the parties do not have children in common and have little other reason to contact each other, it would be more appropriate to dissolve a final restraining order. Where the parties have reason to contact each other, such as where the parties have children in common, it may be less appropriate to dissolve a final restraining order.

COUNSEL: *Jeney & Kingsland*, Attorneys for Plaintiff (*Robert J. Jeney, Jr.*, Esq. appearing)

Ferrara, Siberine, Woodford & Rizzo, Attorneys for Defendant (*Mary Ann Bauer*, Esq. appearing).

JUDGES: DILTS, J.S.C

OPINION BY: THOMAS H. DILTS

OPINION

[*430] [754]** DILTS, J.S.C

The question presented is whether the defendant has shown good cause to dissolve a final restraining order issued pursuant to the *Prevention of Domestic Violence Act of 1990* ("the Act").

[*431] *PROCEDURAL HISTORY*

On May 13, 1992, Ms. Carfagno filed a domestic violence complaint against Mr. Carfagno for allegedly harassing her. The harassment consisted of Mr. Carfagno telephoning Ms. Carfagno four times per day, Mr. Carfagno waiting at Ms. Carfagno's home, and Mr. Carfagno taking Ms. Carfagno's automobile without permission. On May 21, 1992, the court found that Mr. Carfagno committed the above alleged acts of domestic violence and entered a final restraining order against Mr. Carfagno. The order restrains Mr. Carfagno from

contacting Ms. Carfagno, except to discuss the welfare of the parties' child in Ms. Carfagno's custody.

[**755] On September 3, 1992, Mr. [***2] Carfagno pled guilty to contempt of the final restraining order for following Ms. Carfagno, while she was driving, and directing harassing communication toward her. Mr Carfagno received a noncustodial sentence for this conviction.

Mr. Carfagno requested an order against Ms. Carfagno and on September 16, 1992, the court entered a final restraining order against Ms. Carfagno, restraining her from contacting Mr. Carfagno except to discuss matters involving the welfare of the child.

On March 3, 1994, the court found Mr. Carfagno guilty of contempt for the second time for telephoning Ms. Carfagno, on her car telephone, stating that he was following her. For this conviction, the court sentenced Mr. Carfagno to a 30-day custodial term plus one year of probation. Mr. Carfagno appealed this conviction, and the Appellate Division affirmed the judgment of this court.

Presently, Mr Carfagno has applied to dissolve the final restraining order pursuant to N.J.S.A. 2C:25-29(d) Counsel for both parties submitted briefs and certifications to support their positions. The court heard argument of counsel and testimony from both parties on November 8, 1995.

Mr. Carfagno argues that the court [***3] should dissolve the final restraining order because (1) there have been no incidents between the parties since he was found guilty of contempt for the [*432] second time; (2) it is in the best interests of the child that the court dissolve the final restraining order; (3) both parties have "inadvertently violated the orders"; (4) Ms. Carfagno does not presently need the order for protection; and (5) Ms. Carfagno is opposing Mr. Carfagno's request in bad faith to prevent him from obtaining full-time employment with the Beach Haven, N.J., Police Department.

Ms. Carfagno argues that the court should deny Mr. Carfagno's request because (1) there have been incidents between the parties since 1993; (2) she continues to fear Mr. Carfagno; (3) there have not been mutual violations of the final restraining orders; and (4) Mr. Carfagno is motivated to dissolve the final restraining order only to obtain full-time employment with the Beach Haven, N.J., Police Department.

At oral argument, counsel for Mr. Carfagno argued that Ms. Carfagno's assertion of fear lacked credibility. Noting that the court cannot decide

credibility on the papers alone, the court scheduled a short plenary hearing where both parties [***4] offered testimony. See *Harrington v. Harrington*, 281 N.J.Super. 39, 47, 656. A.2d. 456 (App. Div.1995) (where the parties' certifications present a genuine issue of material fact, the court must hold a plenary hearing).

At the plenary hearing, Mr. Carfagno testified in part that, during telephone conversations with Ms. Carfagno regarding the child, Ms. Carfagno was verbally aggressive to Mr. Carfagno, resulting in arguments. Ms. Carfagno testified in part that the parties argued most of the time during the telephone conversations. Ms. Carfagno admitted that she did call Mr. Carfagno "a jerk" but that she did so because Mr. Carfagno forgot to pick the child up for visitation after school and the child waited at school for over two hours as a result. Ms. Carfagno asserted that she continues to be afraid of Mr. Carfagno because Mr. Carfagno constantly harassed her for a seven month period before the entry of the 1992 final restraining order, because Mr. Carfagno violated the final restraining order twice, because she believes that Mr. [*433] Carfagno is still watching and following her, and because Mr. Carfagno has continued to threaten her.

FINDINGS OF FACT

The court finds that [***5] Mr. Carfagno has continued to attempt to assert control and power over Ms. Carfagno. Mr. Carfagno has twice recently provoked Ms. Carfagno to argue in regard to the child. The court notes that Mr. Carfagno has been convicted twice for contempt for violating the final restraining order.

The court also finds that Ms. Carfagno continues to be afraid of Mr. Carfagno, both objectively and subjectively. Ms. Carfagno testified that she feared Mr. Carfagno. The court finds Ms. Carfagno's testimony to be credible despite Mr. Carfagno's assertions that she really does not fear him. Moreover, [**756] the court finds that Ms. Carfagno's fear of Mr. Carfagno is objectively reasonable because the final restraining order arose from circumstances where Mr. Carfagno was harassing and following Ms. Carfagno and because Mr. Carfagno has violated this order at least two times by harassing and following Ms. Carfagno. The court's finding that Mr. Carfagno continues to attempt to assert power and control over Ms. Carfagno bolsters the court's finding that Ms.

Carfagno objectively fears Mr. Carfagno.

The court also finds that Ms. Carfagno has not consented to dissolving the final restraining order. The court further [***6] finds that Ms. Carfagno did not provoke Mr. Carfagno to start arguing with her in regard to the child. The court further finds that Ms. Carfagno is not motivated to prevent Mr. Carfagno from obtaining full time employment and has opposed Mr. Carfagno's application in good faith.

CONCLUSIONS OF LAW

HN1 Under N.J.S.A 2C:25-29(d) the court may dissolve or modify a final restraining order "upon good cause shown." Generally, a court may dissolve an injunction where there is a "a change of circumstances [whereby] the continued enforcement of the [*434] injunctive process would be inequitable, oppressive, or unjust, or in contravention of the policy of the law." *Johnson & Johnson v. Weissbard*, 11 N.J. 552, 555, 95 A.2d 403 (1953). For the reasons stated below, the court finds that Mr. Carfagno has failed to show good cause to dissolve the order.

In N.J.S .A. 2C:25-18, the Legislature provided the legislative findings and declarations as related to the Act.

> ". . . It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide . . . Further, it is the responsibility of the courts to protect the victims [***7] of violence that occurs in a family or family-like setting by providing access to both emergent and long-term civil and criminal remedies and sanctions, and by ordering those remedies and sanctions that are available to assure the safety of the victims and the public..."

The Legislature intended to protect the victims – not to punish the person who committed the act of domestic violence. See generally *Trans American Trucking Service, Inc. v. Ruane*, 273 N.J.Super. 130, 133, 641 A.2d 274 (App.Div.1994) (purpose of an injunction is to protect injured party and not to punish the offending party).

There are no published decisions regarding the application of N.J.S.A. 2C:25-29(d). Although two published decisions state that reconciliation of the

parties acts as a de facto vacation of the restraining order, *Mohamed v. Mohamed*, 232 N.J. Super. 474, 477, 557 A.2d 696 (AppDiv.1989); *Hayes v. Hayes*, 251 N.J. Super 160, 167, 597 A.2d 567 (Ch.Div.1991), a more recent case has suggested that the court must first make an independent finding that continued protection is unnecessary before vacating a restraining order due to reconciliation. *Torres v. Lancellotti,* [***8] 257 N.J. Super. 126, 128, 607 A.2d 1375 (Ch.Div1992). These three cases do not address the factual inquiry that a court must perform when the defendant requests dissolution of a final restraining order in the absence of reconciliation. Therefore, this court concludes that [HN2] the following offers a framework of legal analysis that may be followed when faced with an application to dissolve a final restraining order under N.J.S.A. 2C:25-29(d).

To accomplish the goal of protecting the victim, courts should consider a number of factors when determining whether [*435] good cause has been shown that the final restraining order should be dissolved upon request of the defendant: (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the [***9] defendant; (9) whether the victim is acting in good faith when opposing the defendants request; (10) whether [**757] another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.

FACTORS TO BE CONSIDERED IN DETERMINING WHETHER DEFENDANT HAS ESTABLISHED GOOD CAUSE

1. *Consent of Victim to Lift the Order*

The first factor is whether the victim consents to dissolve the final restraining order. [HN3] Where the victim has consented to lifting the restraining order and the court finds that the victim is doing so voluntarily, the court should dissolve the order without further consideration or analysis.

The Legislature intended that the courts should follow the victim's request to

dissolve a domestic violence order or dismiss a domestic violence complaint without further legal analysis. When construing a statute, the court must follow the legislative intent, considering the policy underlying the statute. *Lesniak v. Budzash*, 133 N.J. 1, 8, 626 A.2d 1073 (1993). "A statute is not to be given an arbitrary construction . . . but rather one that will advance the sense and meaning fairly deductible from [***10] the context." Id. at 14. 626 A.2d 1073.

[*436] The policy of the Act is to provide broad protection for the victim. N.J.S.A. 2C:25-18. The court notes that the Legislature provided that a restraining order would be a civil remedy, N.J.S.A. 2C:25-18 (legislative declarations) and that the victim – not the state – files the complaint to obtain the restraining order, N.J.S.A. 2C:25-23 (victims to be notified of their rights to file a civil complaint for a restraining order); N.J.S.A. 2C:25-28(a) (procedures for the victim to file a civil complaint). Thus, when looking at the entire Act, the court concludes that the Legislature intended to provide broad protection to the victim.

If judges disregard the victim's wishes in determining whether to dismiss a complaint or dissolve a restraining order on the victim's request, this has the effect of discouraging victims from filing complaints when necessary. If the victim perceives that the courts would not be responsive to their request to dismiss the action, that victim or other victims may refrain from filing a domestic violence complaint in the future. Certainly, this is not what the Legislature intended. Thus, if the victim voluntarily requests [***11] the court to dismiss a domestic violence action or dissolve a restraining order, the court should grant the request without conducting any further legal analysis.

Here, Ms. Carfagno has not consented to dissolving the final restraining order. Thus, this factor points to continuing the restraining order.

2. *The Victim's Fear of the Defendant*

The Act protects victims from physical harm. Yet, physical safety is not all that the Legislature intended to protect. Recognizing that domestic violence occurs in a relationship where one party asserts power and control over the other, the victim is also protected from mental or emotional harm.

Fear of the defendant is the center of the cycle of power and control in domestic violence situations. Restraining orders have the effect of empowering the victim to stand up to the defendant. Thus, fear is important to consider.

[*437] Fear of the defendant is especially important when the parties share children. In domestic violence cases involving children, the victim usually has custody of the children. See N.J.S.A 2C:25-29(b)(11) (presumption that victim shall have custody of the children0. It is also presumed that the custodial parent [***12] will act in the best interests of the children. *Gubernat v. Deremer*, 140 N.J. 120, 142, 657 A2d 856 (1995). However, where the victim has continual fear of the defendant, the defendant's perceived control over the victim may attenuate the victim's ability to act in the best interest of the children. Moreover, fear might attenuate the ability of the victim to act in his or her own best interests. Accordingly, it is important to consider the victim's fear of the defendant.

A question remains whether the court should focus on subjective fear or objective fear. Subjective fear is the fear produced [**758] by and within the mind of the victim as the victim understands and communicates it. Objective fear is that fear which a reasonable victim similarly situated would have under the circumstances. The court holds that courts should focus on objective fear. The Legislature intended the courts to consider objective – not subjective – fear. Courts should not construe a statute in a manner that would leave a portion of the statute inoperative. *State v. Reynolds*, 124 N.J. 559, 564, 592 A.2d 194 (1991). The Legislature provided that [HN4]final restraining orders may be dissolved upon good [***13] cause shown. N.J.S.A. 2C:25-29(d). The Legislature did not state that permission of the victim is required before the court can dissolve a final restraining order. Essentially, if the court were to consider only subjective fear, it would be merely determining whether the victim consented to dissolving the final restraining order without considering other relevant information. This is not what the Legislature intended because this interpretation would render the "good cause shown" language inoperative. Thus, the courts must consider objective fear – not subjective fear.

[*438] Moreover, considering merely subjective fear would result in overly broad restraining orders. "The duration of an injunctive order should be no longer than is *reasonably required* to protect the interest of the injured party." *Trans American Trucking Service, Inc. v. Ruane*, 273 N.J.Super. at 133, 641 A.2d 274 (emphasis added). The court must balance the parties' individual rights when determining the breadth of the injunctive order. *Id.* If the courts were to merely focus on subjective fear alone, the scope of the injunction might be broader than is reasonably required to protect the victim and might unduly [***14] infringe the rights of the defendant, Thus when determining whether good cause exists to dissolve a restraining order, the courts must determine

whether the victim continues to fear the defendant, and to apply an objective standard for evaluation; would a reasonable victim similarly situated have fear of the defendant under the circumstances.

Here, the court has found that Ms. Carfagno continues to fear Mr. Carfagno and that a reasonable victim similarly situated would fear Mr. Carfagno. The court notes that, with the order in place, Ms. Carfagno was able to criticize Mr. Carfagno when he failed to pick up the child from school for visitation. Mr. Carfagno's failure to pick up the child was inimical to the child's best interest because the child waited at school for two hours before she was picked up. The court finds that, because Ms. Carfagno still objectively fears Mr. Carfagno, absent a final restraining order, she would have a diminished capacity to act in her or the child's best interest. Thus, this facto points to continuing the final restraining order.

3. *Nature of the Relationship Between the Parties Today*

The third factor is the nature of the relationship between **[***15]** the parties today. Here, [HN5]the court must look to determine whether the relationship today is one that would allow the defendant to exercise control over the victim. Where the parties do not have children in common and have little other reason to [*439] contact each other, it would be more appropriate to dissolve a final restraining order. Where the parties have reason to contact each other, such as where the parties have children in common, it may be less appropriate to dissolve a final restraining order. Other factors for the court's consideration is the relationship of the parties at the time the order was entered. If, for example, there was a dating relationship when the order was entered and two years later when the application is filed, both parties are married to other persons, dissolution may be more appropriate. Certainly, the physical proximity of the parties to each other is another factor bearing upon the relationship. If the parties live in different areas, depending upon other factors present, dissolution may be appropriate.

In all cases, however, when considering the relationship of the parties, the court must determine whether there are indicia of control and domination exercised **[***16]** by the defendant over the victim in the limited amount of contact between the parties permitted under the final restraining order.

[**759] Here, the parties have a child in common. Moreover, the court has found that the parties have engaged in arguments in regard to the welfare of the child, which is within the scope of the limited contact permitted under the final

restraining order, This leads the court to believe that the final restraining order should be continued.

4. *Contempt Convictions*

The fourth factor is the number of times that the defendant has been convicted of contempt for violating the final restraining order. The number of violations of the final restraining order gives an indication that the final restraining order is not totally effective in breaking the cycle of power and control exercised by the defendant. Here, Mr. Carfagno was convicted twice for violating the final restraining order. Both convictions involved [*440] Mr. Carfagno contacting and harassing Ms. Carfagno, Certainly, these convictions do not show that the cycle of power and control [***17] has been broken. Thus, this factor points to continuing the final restraining order.

5. *Alcohol and Drug Involvement*

The fifth factor is whether the defendant has a continuing involvement with drugs or alcohol. In 1994, 39% of all domestic violence incidents involved drugs or alcohol. *Crime in New Jersey: Uniform Crime Report*, 1994 at 189, 198. Alcohol alone was involved in 34% of all reported domestic violence cases. Id. Accordingly, drug or alcohol use is highly relevant in determining whether the victim still needs protection. Here, there is no evidence that Mr. Carfagno is involved with drugs or alcohol. Thus, this factor points to dissolving the final restraining order.

6. *Other Violent Acts*

The sixth factor is whether the defendant has perpetrated violent acts upon the victim or other persons. The defendant's violent nature as evidenced by other violent acts is relevant to whether the victim needs continued protection. See Richard J. Gelles, Ph.D., Regina Lackner, Glenn D. Wolfner, *Men Who Batter*, Violence Update August 1994 at 10. ("Perhaps the most important risk marker...is prior violent or abusive behavior. In the absence of clear or convincing [***18] change, past behavior is probably the single most reliable indicator of future behavior, and battering is no exception.") Here, there is no evidence before the court that Mr. Carfagno has engaged in other violent acts. Thus, this factor leads to dissolving the order.

7. *Whether Defendant Has Engaged in Domestic Violence Counseling*

The seventh factor is whether the defendant has engaged in domestic violence

counseling. Counseling may be effective in breaking the cycle of power and control. " Without intervention or [*441] some form of change agent, the batterer is likely to continue battering." Id. Here the defendant has not shown that he has successfully completed domestic violence counseling, this, this fact points to continuing the final restraining order.

8. *Age/Health of Defendant*

The eighth factor is the age and health of the defendant, In some cases of age or infirmity, it might be appropriate to dissolve the final restraining order. Here, the defendant is a physically fit male who is 33 years old. Thus, this factor points to continuing the final restraining order.

9. *Good Faith of Victim*

The next factor is the good faith of the victim in opposing the defendant's [***19] request to dissolve the final restraining order. The court is mindful that sometimes one party to a divorce action abuses the Act to gain advantage in the underlying matrimonial action. See, *State v. L.C.*, 283 N.J. Super. 441, 449,.662 A.2d 577 (App. Div.1995); *Murray v. Murray*, 267 N.J. Super. 406, 631 A.2d 984 (App. Div.1993). Here, the court has found that Ms. Carfagno opposed Mr. Carfagno's request in good faith. Thus, this factor leads to the conclusion that the final restraining order should be continued.

[**760] 10. *Orders Entered by Other Jurisdictions*

The final factor is whether the victim is protected from the aggressor by a "a verifiable order of protection from another jurisdiction." Under 18 U.S.C. § 2265(a), a restraining order entered in one state is entitled to full faith and credit by courts of another state. Thus, the fact that a foreign state has entered a restraining order protecting the victim from the aggressor must be known and considered by the court.

Here, the parties have not alleged that a foreign jurisdiction has entered a restraining order to protect Ms. Carfagno from Mr, [*442] Carfagno. Thus, this factor points to dissolving the final restraining [***20] order.

11. *Other Factors Deemed Relevant by the Court*

The court also needs to consider any other factors raised by the parties which, based upon the evidence presented, may show that good cause exists to dissolve the restraining order. In this case, the court concludes that there are no other

factors which affect the court's judgment.

CONCLUSION

The legislative standard for dissolution is whether the defendant has shown that good cause appears to dissolve or modify the order. The above factors need to be weighed qualitatively, and not quantitatively, to determine whether defendant has met the required burden. In this case, the court concludes that Mr. Carfagno has not shown good cause to dissolve the order, and his motion is denied.

SENATE BILL REPORT

SHB 2745

AS REPORTED BY COMMITTEE ON LAW & JUSTICE, FEBRUARY 25, 1992

Brief Description: Changing provisions relating to orders for protection and antiharassment orders.

SPONSORS: House Committee on Judiciary (originally sponsored by Representatives H. Myers, Belcher, Forner, Brough, Mitchell, Ogden, Appelwick, Morris, Riley, Ludwig, Paris, Wineberry, Winsley, Scott, Wood, Ferguson, Hochstatter, Sheldon, J. Kohl and Brekke)

HOUSE COMMITTEE ON JUDICIARY

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass.

Signed by Senators Nelson, Chairman; Thorsness, Vice Chairman; Erwin, M. Kreidler, Madsen, and Rasmussen.

Staff: Lidia Mori (786-7755)

Hearing Dates: February 25, 1992

BACKGROUND:

The Domestic Violence Protection Act allows a person who alleges that he or she is a victim of domestic violence to petition the court for a protection order. The act contains detailed procedural requirements for issuing the orders.

Upon receipt of the petition, the court must order a hearing to be held within 14 days. The respondent must be personally served with notice of the hearing five days prior to the hearing. Pending the hearing, the court may issue a temporary ex parte order of protection. If the respondent is not served on time, the court may reset the hearing and renew the ex parte order of protection for another 14 days. This process may be repeated a number of times if personal service cannot be made on the respondent.

After a hearing, the court may grant a protection order for a period not to exceed one year. The petitioner must initiate the process again if the petitioner wants continued protection after the one-year order expires.

The court may require the respondent to pay the filing fee, court costs, service fees, and other costs, including reasonable attorney fees.

Law enforcement must retain the order in their computer based information system for one year.

Very similar procedures exist under the Antiharassment Act. That act allows a petitioner who is being harassed by someone who is not a "family or household member" to seek a protection order. That act does not provide for award of costs and attorney fees.

SUMMARY:

The Domestic Violence Protection Act and the Antiharassment Act are amended to provide, under certain circumstances, for service of process by publication, entry of a permanent protection order or orders that last longer than one year, and award of costs and

attorney fees in antiharassment cases.

Service of process by publication. If personal service has not been made on the respondent, the court must reset the hearing, may reissue the ex parte protection order, and must either order further attempts at personal service or allow service by publication.

The court may order service by publication if: 1) the server files an affidavit stating the server was unable to complete personal service. The affidavit must describe the number and types of attempts the server made to complete service; 2) the petitioner files an affidavit stating the petitioner believes the respondent is hiding to avoid service. The petitioner must explain the reasons for that belief; 3) the server has deposited a copy of the summons, notice of hearing, and ex parte order of protection in the post office directed to the respondent's last known address; and 4) the court finds reasonable grounds exist to believe the respondent is concealing himself or herself to avoid service and that further attempts to personally serve the respondent will be unduly burdensome or futile.

The publication must run once a week for three weeks in one of the three most widely circulated newspapers in the county of the respondent's last known address and in the county where the hearing will be held. The publication must contain the summons, signed by the petitioner, a brief statement of the reason for the petition and a summary of the provisions under the ex-parte order. Service is considered complete upon expiration of the three weeks. The court must reset the hearing for 24 days from the date of issuing the ex parte order and order permitting service by publication. The petitioner must pay for the costs of publication unless the county legislative authority authorizes funds for that purpose.

Permanent order of protection. The court may issue a permanent protection order or a protection order for longer than one year if the court finds the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members upon expiration of a one-year order. The court may not issue an order of protection for longer than one year if the order prohibits contact with the respondent's minor children.

The court must specify in the order for protection whether the order

was granted after personal service or service by publication and whether the final order was ordered served by publication or served personally. Law enforcement must put the information about how service of process was obtained into the computer system so that they know whether service was by publication or personal service. The court must advise the petitioner that if service of process is obtained by publication, the respondent will not be subject to criminal and contempt sanctions unless the respondent "knows of the order." When the police investigate a report of a violation of a no-contact order, the police must try to determine whether the respondent knew of the order. If the police think that the respondent did not know or probably did not know of the order, the officer must make a reasonable attempt to obtain a copy of the order and serve it on the respondent during the investigation.

Reissuance of a one-year order. If the court issues a one-year order and the petitioner applies for a renewal of the order, the court must grant the petition unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence upon expiration of the order. The same rules regarding service of process apply to these provisions.

Antiharassment cases. Similar provisions are adopted in the antiharassment statute. The court may award costs and attorney fees to the petitioner in an antiharassment case.

Appropriation: none

Revenue: none

Fiscal Note: requested

TESTIMONY FOR:

It is very traumatizing for a person who wants to renew a protection order to have to convince a judge and possibly face the respondent every time the order expires. It is also financially costly. This bill would allow protection and civil

antiharassment orders to be permanent in some cases.

TESTIMONY AGAINST: None

TESTIFIED: Representative Holly Myers (pro)